

ORDINANCE NO. _____

AN ORDINANCE OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, AMENDING CHAPTER 70 OF THE MIAMI BEACH CITY CODE ENTITLED "MISCELLANEOUS OFFENSES"; BY AMENDING ARTICLE V ENTITLED "FALSE CLAIMS ORDINANCE"; BY AMENDING SECTION 70-304 ENTITLED "INTERVENTION BY THIRD PARTIES IN CIVIL ACTIONS FOR FALSE CLAIMS" FOR THE PURPOSE OF FURTHER ESTABLISHING THE AUTHORITY FOR PERSONS TO BRING AN ACTION FOR VIOLATION OF THE FALSE CLAIMS ORDINANCE; BY AMENDING SECTION 70-305 ENTITLED "RIGHTS OF THE PARTIES IN CIVIL ACTIONS" WHICH GRANTS A PERSON WHO BRINGS AN ACTION NOTIFICATION OF, AND AN OPPORTUNITY TO BE HEARD BEFORE THE CITY VOLUNTARILY DISMISSES THE ACTION; BY AMENDING SECTION 70-307 ENTITLED "EXPENSES; ATTORNEY'S FEES AND COSTS" TO ALLOW DEFENDANT THE AUTHORITY TO RECOUP REASONABLE ATTORNEY'S FEES IN DEFENDING AN ACTION UNDER THE FALSE CLAIM ORDINANCE; AND PROVIDING FOR REPEALER; SEVERABILITY; CODIFICATION; AND AN EFFECTIVE DATE.

NOW, THEREFORE, BE IT DULY ORDAINED BY THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, AS FOLLOWS:

SECTION 1.

That Section 70-304 of Article V, entitled "False Claims Ordinance," of Chapter 70 entitled "Miscellaneous Offenses," of the Miami Beach City Code, is hereby amended as well as the entire Article V is provided for reference purposes, as follows:

CHAPTER 70

MISCELLANEOUS OFFENSES

* * *

ARTICLE V. FALSE CLAIMS ORDINANCE

Sec. 70-300. Short title; purpose.

- (a) This article shall be known and may be cited as the city false claims ordinance.
- (b) The purpose of the city false claims ordinance is to deter persons from knowingly causing or assisting in causing the city to pay claims that are false, fraudulent, or inflated, and to provide remedies for obtaining treble damages and civil penalties for the city when money is sought or obtained from the city by reason of a false claim;

(c) The provisions of this article are not exclusive, and the remedies provided for in this article shall be in addition to any other remedies provided for in any other law, or available under common law, or otherwise.

(d) This article shall be liberally construed and applied to promote the public interest.

Sec. 70-301. Definitions.

The following terms and phrases when used in this article shall have the meanings ascribed to them in this section, except when the context clearly indicates a different meaning:

Bid takeoff means the final estimate, tabulation, or worksheet prepared by the contractor in anticipation of the bid submitted, and which shall reflect the final bid price.

Claim means any invoice, statement, request, demand, lawsuit, or action under contract or otherwise, for money, property, or services made to any employee, officer, or agent of the city, or to any contractor, grantee, or other recipient if any portion of the money, property, or services required or demanded was issued from, or was provided by, the city (hereinafter "city funds").

Claimant means any person or entity (including all officers, directors, employees or agents thereof who authorize, or participate) that brings, submits, files, maintains, or pursues a claim against the city or the city redevelopment agency.

City means the government of Miami Beach or any department, division, bureau, section, commission, planning agency, board, district, authority, agency, or instrumentality of the city, including the city redevelopment agency.

Extended overhead means the amount of a claim relating to an increase in overhead costs resulting from a delay in contract performance that is not compensated by a markup of direct costs.

Knowing or *knowingly* means that a person, with respect to information:

- (1) Has actual knowledge of the information;
- (2) Acts in deliberate ignorance of the truth or falsity of the information; or
- (3) Acts in reckless disregard of the truth or falsity of the information.

No proof of specific intent to defraud is required. However, innocent mistake shall be a defense to an action under this article.

Overhead per diem means the amount calculated by dividing the total overhead costs set forth in the final bid takeoff by the number of days for substantial completion of the work set forth in the contract.

Person means any natural person, corporation, firm, association, organization, partnership, limited partnership, agency, limited liability company, business, trust, attorney at law, or other similar individuals, firms, associations, or agency.

Sec. 70-302. Certification of claims.

(a) Upon the request of the city, the person submitting a claim shall, within 30 calendar days, including Saturdays, Sundays, and legal holidays, submit a certified claim as defined by this section. A "certified claim" shall be made under oath by a person duly authorized by the claimant, and shall contain a statement that:

- (1) The claim is made in good faith;
 - (2) The claims' supporting data are accurate and complete to the best of the person's knowledge and belief;
 - (3) The amount of the claim accurately reflects the amount that the claimant believes is due from the city;
 - (4) The person certifying the claim has personally reviewed all supporting data; and
 - (5) The certifying person is duly authorized by the claimant to certify the claim.
- (6) Further, all certified claims shall contain the following statement directly above the signature line of the certifying person, in 12 point bold type:

Any person who knowingly presents or causes to be presented, to the City a false or fraudulent claim for payment or approval or uses or causes to be made or used a false record or statement, or conspires to get a false, fraudulent or inflated claim paid by the City, or delivers, with the intent to defraud, goods or services of different quality than specified, or executes a receipt of property used or to be used by the City without completely knowing that the information on the receipt is true, or knowingly makes, uses or causes to be made or used a false record or statement to conceal, avoid or decrease an obligation to pay or transmit money or property to the City, shall be liable to the City for an amount equal to three (3) times that part of the claim which is false, fraudulent, or inflated, plus all costs and fees incurred by the City. Any person found to have submitted a false claim shall immediately, fully and irrevocably forfeit the entire amount of the claim and be subject to debarment from City contracting for a period of five (5) years. Liability shall be joint and several for any act committed by two (2) or more persons.

(b) Failure to provide the required certification within the prescribed 30-day period shall constitute a forfeiture of the entire claim.

Sec. 70-303. Liability for false claims; penalties.

(a) The following action(s) shall constitute a violation of this article:

- (1) Any person who knowingly presents or causes to be presented to the city or to any officer, employee, agent or consultant of the city, a false or fraudulent claim for payment or approval;

(2) Any person who knowingly makes, uses, or causes to be made or used, a false record or statement to get a false, fraudulent, or inflated claim paid or approved by the city;

(3) Any person who conspires to defraud the city by facilitating the payment of a false, fraudulent, or inflated claim allowed or paid by the city;

(4) Any person who delivers, with the intent to defraud the city, goods or services of different quality or quantity than that specified in the applicable contract or specification;

(5) Any person who is authorized to make or deliver a document certifying receipt of property used, or to be used, by the city and, intending to defraud the city, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) Any person who knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer, employee, or agent of the city who lawfully may not sell or pledge the property; or

(7) Any person who knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the city.

(b) Any beneficiary of an inadvertent submission of a false claim to the city, who subsequently discovers the falsity of the claim, and who fails to disclose the falsity of the claim to the city within 30 days of discovering the error, shall also be found to have submitted a false claim to the city.

(c) Any person found to have submitted a false claim to the city shall:

(1) Be liable to the city for an amount equal to three times that part of the claim which is false, fraudulent, or inflated;

(2) Immediately, fully, and irrevocably forfeit the entire amount of the claim;

(3) Be liable to the city for all costs and fees (including, without limitation, reasonable legal, expert, and consulting fees) incurred by the city to review, defend, evaluate and or litigate or arbitrate the false claim; and

(4) Be subject to debarment from city contracting pursuant to chapter 2, division 5, subsection 2-406(b)(3) of this Code for a period of five years. Additionally, any person who certified a claim later found to be false shall be subject to debarment from city contracting for a period of two (2) to five (5) years. Debarment under this article may be granted by a court of competent jurisdiction as part of the relief requested in the complaint filed with the court.

(d) Liability under this section shall be joint and several for any act committed by two or more persons.

Sec. 70-304. Intervention by third parties in civil actions for false claims.

(a) The city manager, or his designee, may investigate a violation under section 70-303. If the city manager or his designee finds that a person has violated or is violating section 70-303, he or she may bring a civil action against the person on behalf of the city and shall inform the commission of the action to be taken.

(b) A resident of the City, ~~or~~ person in privity of contract, or any person or their employees, including any subcontractors and their employees, who have a contractual relationship with the City of Miami Beach, under which the false claim was made may bring a civil action for a violation of section 70-303 for the person and for the city. Civil actions instituted under this article shall be governed by the Florida Rules of Civil Procedure and shall be brought in the name of the city.

(1) The complaint shall be identified on its face as a qui tam action and shall be filed under seal in the ~~e~~Circuit ~~e~~Court of the Eleventh Judicial Circuit, in and for Miami-Dade County. Immediately upon filing of a complaint by a person, a copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the city manager and city attorney by registered mail, return receipt requested. The city manager may elect to proceed with the action, in lieu of the qui tam plaintiff, on behalf of the city, within 180 days after he or she receives both the complaint and the material evidence and information.

(2) The city manager, for good cause shown, may petition the court to extend the time during which the complaint remains under seal under subsection (1). Any such motion may be supported by affidavits or other submissions in camera. The defendant is not required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant in accordance with law.

(3) Before the expiration of the 180-day period or any extensions obtained under subsection (2), the city manager shall:

- a. Proceed with the action, in which case the action is conducted by the city attorney on behalf of the city; or
- b. Notify the court that the city declines to take over the action, in which case the person bringing the action has the right to conduct the action.

(4) When a person files an action under this section, no person other than the city manager on behalf of the city may intervene or bring an action under this article based on the facts underlying the pending action.

SECTION 2. That Section 70-305 of Article V, entitled "False Claims Ordinance," of Chapter 70 entitled "Miscellaneous Offenses," of the Miami Beach City Code, is hereby amended as follows and other provisions of Article V are set forth for reference purposes:

Sec. 70-305. Rights of the parties in civil actions.

(a) If the city manager, on behalf of the city, elects to proceed with the action, he or she has the primary responsibility for prosecuting the action, and is not bound by any prior or subsequent act(s) of the person bringing the action. The city may also voluntarily dismiss the action notwithstanding the objections of the person bringing the action if the person has been notified by the City of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(b) If the city manager elects not to proceed with the action and does not voluntarily dismiss the action, the person bringing the action has the right to conduct the action. If the city manager so requests, he or she shall be served with copies of all pleadings and motions filed in the action and copies of all deposition transcripts. When the person bringing the action proceeds with the claim, the court may permit the city to take over the action on behalf of the city at a later date upon a showing of good cause.

(c) Nothing in this article shall be construed to limit the authority of the city or the qui tam plaintiff, proceeding pursuant to subsection 70-304(2), to compromise a claim brought in a complaint filed under this article if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances.

A civil action under this article may not be brought:

(1) More than five years after the date when the facts material to the right of action are known or reasonably should have been known by the city official charged with the responsibility to act in the circumstances, but in no event more than seven years after the date on which the violation of section 70-303 is committed, whichever occurs last; or

(2) In the event any person files a civil action which contains false claims, in whole or part, the city may pursue its remedies by counterclaim without the limitations of subparagraph (1) hereinabove.

Sec. 70-306. Awards to plaintiffs bringing action.

(a) If the city proceeds with and prevails in an action brought by a person under this article, except as provided in subsection (b), the court shall order the distribution to the person of ten percent of the proceeds recovered under any judgment obtained by the city in an action under section 70-303 or of the proceeds of any settlement of the claim.

(b) If the city proceeds with an action which the court finds to be based primarily on disclosures of specific information, other than that provided by the person initiating the action, relating to allegations or transactions in a criminal, civil, or administration hearing; a legislative, administrative, or inspector general report, hearing, audit, or investigation; or from the news media, the court may award such sums as it considers appropriate, but in no case more than five percent of the proceeds recovered under a judgment or received in settlement of a claim under this article, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation.

(c) If the city does not proceed with an action under this article and does not voluntarily dismiss the action pursuant to subsection 70-305(a), the person bringing the action or settling the claim shall receive 25 percent of the proceeds recovered under a judgment rendered in an action under this article or in settlement of a claim under this article, with the balance going to the city.

(d) Any payment under this section to the person bringing the action shall be paid only out of the proceeds recovered from the defendant.

(e) Whether or not the city proceeds with the action, if the court finds that the action was brought by a person who planned, initiated, or furthered the violation of section 70-303 upon which the action was brought, the person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the city to continue the action.

SECTION 3. That Section 70-307 of Article V, entitled "False Claims Ordinance," of Chapter 70 entitled "Miscellaneous Offenses," of the Miami Beach City Code, is hereby amended as follows and other provisions of Article V are set forth for reference purposes:

Sec. 70-307. Expenses; attorney's fees and costs.

(a) If the city initiates an action under this article or assumes control of an action brought by a person under this article, and the city prevails in such action, the city shall be awarded its reasonable attorney's fees, ~~expenses,~~ and costs.

(b) If the court awards the person bringing the action proceeds under this article, the person shall also be awarded ~~an amount for~~ its reasonable attorney's fees and costs. Payment for reasonable attorney's fees and costs shall be made from the recovered proceeds before the distribution of any award.

(c) If the city does not proceed with an action under this article and the ~~defendant is the prevailing party, the court shall award the defendant reasonable attorney's fees and costs against the person bringing the action~~ person bringing the action conducts the action, the court may award to the defendant its reasonable attorney's fees and costs if the defendant prevails in the action and the court finds that the claim of the person bringing the action was frivolous, vexatious, or brought primarily for purposes of harassment.

(d) No liability shall be incurred by the city for any expenses, attorney's fees, or other costs incurred by any person in bringing or defending an action under this article, except as otherwise specifically provided by law.

Sec. 70-308. Exemptions to civil actions.

(a) In no event may a person bring an action under section 70-303 based upon allegations or transactions that are the subject of a civil action or an administrative proceeding in which the city is already a party.

(b) No court shall have jurisdiction over an action brought under this article based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing; in a legislative, administrative, or inspector general report, hearing, audit, or investigation; or from the news media, unless the action is brought by the city, or unless the person bringing the action is an original source of the information. For purposes of this subsection, the term "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the city manager before filing an action under this article based on the information and who is not an employee or agent of the city.

(c) No court shall have jurisdiction over an action where the person bringing the action under section 70-303 is:

(1) Acting as an attorney for the city; or

(2) An employee or former employee of the city, and the action is based, in whole or in part, upon information obtained in the course or scope of city employment.

(d) No court shall have jurisdiction over an action where the person bringing the action under section 70-303 obtained the information from an employee or former employee of the city.

Sec. 70-309. Protection for participating employees.

Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms or conditions of employment by his or her employer because of lawful acts done by the employee in furtherance of an action under this article, including investigation for, testimony for, or assistance in an action filed or to be filed under this article, shall have a cause of action under F.S. § 112.3187.

Sec. 70-310. Burden of proof; presumption of false claim.

(a) Whenever practicable, bid specification for city contracts shall contain a requirement that the successful bidder maintain, as a condition precedent to submitting a claim against the city, a final bid takeoff. The final bid takeoff shall contain a line item for allocation of overhead costs.

(b) Upon request from the city, a contractor making a claim against the city for delay or other damages shall submit, within 20 days, a copy of the final bid takeoff, certified pursuant to this subsection. Failure to provide the requested certification shall constitute a forfeiture of the claim for delay or other damages. The certification shall be submitted under oath by a person fully authorized by the claimant and shall contain a statement that:

(1) The final bid takeoff was prepared contemporaneously with the bid and in anticipation of the bid for the project;

(2) The contractor relied on the final bid takeoff to prepare the bid and the original schedule of values; and

(3) The final bid takeoff has not been altered in any way.

(c) Any claim for extended overhead cost that exceeds, on a per diem basis, more than ten percent of the overhead per diem contained in the final bid takeoff shall be presumed to be a false claim, and the contractor shall have the burden of proving that any such claim for extended overhead is not false.

Sec. 70-311. Innocent claimant affirmative defense.

The provisions of this article shall not apply if the claimant can demonstrate, by the greater weight of the evidence, each of the following facts:

(1) The claimant submitted or caused to have submitted the claim to or against the city reasonably believing that such claim was free of any material misstatements, or any exaggerated, inflated, or unsubstantiated assertions or damages;

(2) The claimant had no reasonable basis to doubt the truth, veracity, or accuracy of such claim at the time it was submitted;

(3) Prior to submitting the claim, the claimant diligently investigated the facts underlying such claim and prepared the claim in a reasonable manner given all the relevant information available; and

(4) When information indicating that any element, statement, or allegation in the claim was false or misleading first became available, such claimant, with five business days of discovering the falsity of the claim, took immediate steps to modify, correct, or withdraw such claim and provided the city with immediate notice thereof.

Sec. 70-312. Construction and severability of provisions.

(a) This article shall be liberally construed to effectuate its remedial and deterrent purposes.

(b) If any provision of this article or its application to any particular person or circumstance is held invalid, that provision or its application is severable and does not affect the validity of other provisions or applications of this article.

Secs. 70-313--70-399. Reserved.

SECTION 4. Repealer.

All ordinances or parts of ordinances in conflict herewith be and the same are hereby repealed.

SECTION 5. Severability.

If any section, sentence, clause or phrase of this ordinance is held to be invalid or unconstitutional by any court of competent jurisdiction, then said holding shall in no way affect the validity of the remaining portions of this ordinance.

SECTION 6. Codification.

It is the intention of the Mayor and City Commission of the City of Miami Beach, and it is hereby ordained that the provisions of this ordinance shall become and be made a part of the Code of the City of Miami Beach, Florida. The sections of this ordinance may be renumbered or re-lettered to accomplish such intention, and the word "ordinance" may be changed to "section," "article," or other appropriate word.

SECTION 7. Effective Date.

This Ordinance shall take effect the _____ day of _____, 2009.

PASSED and ADOPTED this _____ day of _____, 2009.


ATTEST:

Robert Parcher, City Clerk

Matti Herrera Bower
Mayor

Underline denotes additions and ~~strike through~~ denotes deletions

APPROVED AS TO
FORM & LANGUAGE
& FOR EXECUTION



City Attorney AB

9/5/09

Date